



IN THE
SUPREME COURT OF THE UNITED STATES

NO. 78-1071

RAYMOND HUGHES,

Appellant

v.

MADGE J. HUGHES,

Appellee/Respondent

MOTION TO DISMISS OR AFFIRM PURSUANT TO RULE 16

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF ALABAMA

RICHARD W. WHITTAKER

Attorney for Appellee

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(a) OPINIONS BELOW

The opinion of the Supreme Court of Alabama is reported at 362 So. 2d 918 (1978). The opinion of the Court of Civil Appeals of Alabama is reported as Hughes v Hughes, Ala. Civ. App., 362 So. 2d 910 (1978). The opinion of the Circuit Court of Coffee County, Alabama is not reported, but is set forth in Appellant's appendix to Jurisdictional Statement pursuant to Rule 15.

(b) MOTION TO DISMISS

Appellee respectfully submits that This Honorable Court should dismiss Appellant's appeal for that the appeal is not within the jurisdiction of this Court because it was not perfected in conformity with Alabama procedural law. This Honorable Court is without jurisdiction to consider the appellant's constitutional challenge of The Alabama Alimony Statutes because appellant raised such issue for the first time on a Motion for New Trial. Hughes v Hughes, 362 So.2d 910 (Ala. App.), Cert. dismissed as improvidently granted, 362 So.2d 918 (Ala. 1978). This Honorable Court indicated that such tardiness would constitute a procedural default under Alabama law, and since Alabama refused to hear Mr. Hughes' constitutional objection on that ground, this Court is without jurisdiction to consider it on appeal. Orr v Orr No. 99-1119, page 5 and C. Wright, Federal Court 541-542 (3rd. Ed. 1976). Also Mr. Justice Powell clearly indicated this should be the holding in his dissenting opinion in Orr v Orr, No. 77-119, Dissent (B), page 2.

(c) MOTION TO AFFIRM

Appellee submits that This Honorable Court should affirm the judgment below for that the award of "Alimony" was based on need of appellee, and was a division of property. As pointed out in Orr v Orr, No. 77-119, This Honorable Court ruled the Alimony Statute of Alabama unconstitutional as it uses sex as a proxy for need, and in that case remanded the case to the Alabama court to determine

if the award of alimony was based on other grounds of gender-neutral state law. In the case presently pending before this Court, the trial court in Alabama made an independent determination based solely on the need of appellee and not on sex, and further the Alabama trial court in awarding what it termed "alimony in gross" was really a division of property between the spouses. See the Alabama trial court's opinion set out in appellant's appendix to Jurisdictional Statement, at page 8, where the Alabama trial court awarded appellee monies, termed alimony in gross, "based on the value of plaintiff's inchoate rights in her husband's estate". Thus it is obvious from a reading of the trial court's opinion that sex was not the determinative factor, but the needs of appellee and a division of property were the factors upon which the trial court based its decision.

CONCLUSION

For the reasons stated, the appeal should be dismissed and/or the judgment sought to be reviewed should be affirmed.

Respectfully submitted,

PITTMAN, WHITTAKER & HOOKS

By: Richard W. Whittaker
Richard W. Whittaker
Attorney for Appellee

CERTIFICATE OF SERVICE

I, a member of the Bar of Supreme Court of The United States, hereby certify that I have served a copy of the foregoing upon Mr. Richard H. Gill, P. O. Box 347, 444 South Perry Street, Montgomery, Alabama 36101, Attorney for Appellant, by mailing the same, postage prepaid on this the 21 day of March, 1979.

Richard W. Whittaker
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